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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

JUN 24 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Southwestern Bell Telephone Company, Pacific Bell, ) CC Docket No. 98-91  
and Nevada Bell Petition for Relief from )  
Regulation Pursuant to Section 706 of the )  
Telecommunications Act of 1996 and 47 U.S.C. § 160 )  
for ADSL Infrastructure and Service )  
 )

**COMMENTS OF THE  
COMMERCIAL INTERNET EXCHANGE ASSOCIATION**

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The Commercial Internet eXchange Association ("CIX"), by its attorneys, files these comments on the June 9, 1998 "Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for Relief from Regulation" (the "SBC Petition" or "Petition"). CIX is a trade association that represents over 150 Internet Service Providers ("ISPs") who handle over 75% of the United States' Internet traffic.<sup>1</sup> CIX works to facilitate global connectivity among commercial ISPs in the United States and throughout the world. A CIX membership list is attached hereto. CIX is quite concerned that a grant of the SBC Petition would amount to nothing less than a new RBOC data local access monopoly, to the detriment of the innovative and competitive Internet services.

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<sup>1</sup> The views expressed herein are those of CIX as a trade association, and are not necessarily the views of each individual member.

### **Summary and Introduction**

CIX heartily supports the development of new telecommunications services that offer data users more innovative opportunities to access the Internet. Thus, in addition to traditional voice-grade wireline access, CIX anticipates the day when local competition among telecommunications carriers, as envisioned by the Telecommunications Act of 1996 ("1996 Act"), will yield a host of exciting alternatives to the current incumbent Local Exchange Carrier ("ILEC") monopoly services. These new providers and services will surely compete for the American consumer in terms of price (e.g., services that are competitive with ILEC ISDN offerings), quality of service (e.g., more responsive installation and customer care services), access convenience and portability (e.g., terrestrial wireless data and satellite data services), as well as a greater bandwidth options with alternative technologies engineered for data packet-switched communications.

CIX believes that competition for Internet services is well-served by the 1996 Act and the Commission's on-going policies for competitive safeguards governing ILEC participation in the information services markets. Consistent with these regulatory and statutory goals, incumbent LECs must continue to keep the underlying telecommunications services (which should include unbundled elements of those services) open on equal and affordable terms for all competing telecommunications and Internet providers. Indeed, because the local access to both business and residential customers is still wholly in the hands of the ILEC, a competitive information and Internet market *can only* exist when all Internet providers have access at competitive prices to the same underlying ILEC telecommunications service offerings.

In CIX's view, the SBC Petition is fundamentally antithetical to these principles of competitive safeguards, open access to telecommunications services, and rigorous competition among Internet providers. If granted, it could devastate the vast majority of ISPs that lack facilities of their own and must rely on "equal access" to the ILEC network in order to reach their

residential and business customers. Similarly, CLECs and other telecommunications carriers that could offer xDSL to ISPs in competition would be deprived of their unbundling and resale rights.

SBC claims that the relief requested is authorized by and consistent with Section 706 of the 1996 Act and Section 10 of the Communications Act. Primarily, SBC claims that the Petition meets the "public interest" standards found in both statutory provisions. As discussed below, CIX submits that the Petition is repugnant to the "public interest."

Further, SBC claims that the requested relief meets the other prongs of the Section 10 forbearance test, and that Section 706 provides the Commission with independent forbearance authority. CIX disagrees. The SBC Petition fails to meet any aspect of the Section 10 forbearance test. In addition, SBC badly misconstrues Section 706, with Section 10, Congress expressly forbid the Commission from forbearance of Section 251 of the Act it did not implicitly permit such forbearance under Section 706. In any event, the SBC Petition is patently inconsistent with the Section 706 goal of promoting competitive markets, and so the statute would provide no jurisdictional support for a grant of the Petition. As Chairman Kennard recently explained, "[t]he best way to ensure more bandwidth is to encourage local competition."<sup>2</sup> CIX believes that local competition is not furthered in any way by the relief requested in the SBC Petition.

### **Discussion**

#### **I. The "Public Interest" Would Not Be Served By Granting the SBC Petition**

##### **A. Section 251 Unbundling and Resale Obligations Better Ensure A Competitive Data Services Market.**

SBC asserts that relief from Section 251(c) unbundling of the electronics integrated into its ADSL service and the wholesale resale obligation would serve the "public interest." CIX

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<sup>2</sup> FCC News, "Chairman William E. Kennard Receives Alliance for Public Technology Pioneer Award; Outlines Guidelines for Bandwidth" (Feb. 27, 1998).

strongly disagrees. The SBC Petition contravenes the "public interest" because SBC's "commitments" to unbundling and resale demonstrate a lack of functional and competitive access to ADSL-conditioned loops. Further, Congress decided with the 1996 Act that these obligations apply to all telecommunications services offered by the ILEC. Finally, SBC's refusal to offer ADSL electronics on an unbundled basis would only promote market dominance, inefficiency, and waste.

1. *SBC's "Commitments" to Unbundling Fall Short.*

While SBC claims that it is "committed to ensuring that carriers" offering ADSL will have "equivalent access to ADSL-qualified unbundled loops,"<sup>3</sup> the ILECs have generally demonstrated a commitment to unbundling for CLECS that is sorely lacking.<sup>4</sup> Access to SBC loops are even less promising with three additional SBC-controlled processes by which to reject competitors' requests for ADSL conditional loops.<sup>5</sup>

Moreover, it is doubtful that competitors would actually receive "equivalent access" from SBC. First, SBC would require customers of data providers to purchase a second line.<sup>6</sup> If the same customer chose SBC's service, however, no second line expenditure would be necessary,<sup>7</sup>

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<sup>3</sup> Petition at 17.

<sup>4</sup> See, e.g., Comments of Covad Communications, CC Dkt. No. 98-11, 98-26, 98-32 at 8 (filed April 6, 1998); Comments of ICG, CC Dkt. No. 98-32 at 8 (filed April 6, 1998); Comments of Focal Communications, Hyperion Telecommunications, KMC Telecom, and McCleod USA, CC Dkt. No. 98-11, 98-26, 98-32 at 17 (filed April 6, 1998); Comments of WorldCom, Inc., CC Dkt. No. 98-78 at 6 (filed June 18, 1998).

<sup>5</sup> Petition at 18-19 (SBC may reject competitor's request for loop based on asserted failure to pass SBC-controlled tests: "facility availability;" "loop qualification check;" and "spectrum management checks").

<sup>6</sup> Petition, at n. 17.

<sup>7</sup> As discussed below ( in I.A.2), this market imbalance results from SBC's position to exclude competitors from UNE access to DSL equipment.

and so SBC's practice would obviously skew customers' economic incentives away from competing data providers and toward SBC's combined voice and data service. In addition, SBC vaguely claims that "conditioning will be available as an option" for loops that are not properly conditioned today (i.e. loops with load coils, bridge taps, etc.).<sup>8</sup> However, SBC fails to describe the essential terms of this "option," such as: price; whether competitors can order the "option"; the time it will take to condition such loops; whether loop conditioning is available in some, most, or only a few central offices.<sup>9</sup> In short, SBC's "commitment" to offering "equivalent access" is far too questionable to ensure a competitive market.

2. *"Public Interest" is Disserved by Exempting ADSL Electronics (e.g., DSLAM) from Unbundling Obligations*

Unbundling of the ILEC network is part of the essential fabric of the 1996 Act creating a federal policy to open up the local telecommunications market. 47 U.S.C. § 251(c)(3).

Unbundling serves this public interest goal in a number of ways. First, it permits new entrant carriers to establish an early foothold in the marketplace, by combining their own more limited facilities with the elements of the ILECs' ubiquitous network. As noted by the 1996 Act Conference Report, "[i]t is unlikely that competitors will have a fully redundant network in place when they initially offer local service . . . [s]ome facilities and capabilities . . . will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new

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<sup>8</sup> Petition at 19.

<sup>9</sup> See, Comments of WorldCom, Inc., CC Dkt. No.98-78 at 12 (filed June 18, 1998) ("Most ILECs are not provisioning any DSL-conditioned loops upon reasonable request."). Similarly, the SBC/Pacific Bell ADSL Tariff vaguely states that line conditioning is available as a nonrecurring charge, but it "does not warrant that Line conditioning will permit the provisioning of ADSL service." Pacific Bell Telephone Company, Tariff F.C.C. No. 128, Transmittal No. 1986, at § 17.5.3(A)(2) (filed June 15, 1998).



section 251."<sup>10</sup> Second, unbundling allows competing providers to recombine the ILEC's UNEs with other equipment or services to yield a more efficient offering, or to offer niche services that the ILEC may be unwilling to furnish. Finally, even in areas where no direct competition may exist, the threat of competitive entry using cost-based UNEs adds some competitive pressure on ILEC pricing and service practices.<sup>11</sup>

While SBC contends that the electronics associated with its ADSL service should not be subject to Section 251(c), this would circumvent the clear language and intent of the 1996 Act. The ADSL service is undoubtedly a "telecommunications service" offerings, in which the DSLAM and other electronics function as an element.<sup>12</sup> Thus, the electronics used with the service are "network elements," and subject to Section 251(c) obligations. 47 U.S.C. § 152(29)("network element" means a facility or equipment used in the provision of a telecommunications service").<sup>13</sup> By broadly defining "network element," Congress

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<sup>10</sup> S. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 148.

<sup>11</sup> CIX notes that this threat of competitive entry diminishes as the costs and barriers of entry rise. In this case, the costs of purchasing, installing and maintaining separate ADSL equipment in each ILEC central office may be a significant deterrent to competitive entry.

<sup>12</sup> The fact that the ILEC may integrate its xDSL service with its Internet access service does not in any way alter the regulatory treatment of the underlying transmission service. AT&T Frame Relay Declaratory Ruling, Memorandum Opinion and Order, 10 FCC Red. 13717, 13725 (1995) (Computer II requires a facilities-based carrier engaged in "enhanced" services to separate and tariff its "basic" services)).

<sup>13</sup> The 1996 Act makes perfectly plain that incumbent LECs must unbundle and allow access "at any technically feasible point," and offer all of its local telecommunications services to competing providers. 47 U.S.C. § 251(c)(3)&(d)(2).

unequivocally laid down statutory law and a public policy for open and comprehensive access to the elements of SBC's ADSL service.<sup>14</sup>

There is no merit to SBC's claim that these network elements of the ADSL service should be somehow exempt from the statutory unbundling obligation. As a practical matter, SBC's ADSL service is *intrinsically married* to its local service monopoly. If achieved, the benefits of ADSL are largely measured in terms of much greater bandwidth to homes and businesses through the existing ubiquitous network of telephone access lines.<sup>15</sup> Thus, SBC already controls the lines over which the service is offered, and the process of provisioning those lines to competing data providers.<sup>16</sup> The ILEC also effectively controls and limits collocation space for the equipment of competing providers, and other technical deployment decisions, that impact the level of competition for the service. Finally, the ILECs are deeply entrenched in the ADSL Forum standards-setting process, and so may ensure that manufacturers of xDSL equipment favor their own deployment. If left with no duty to offer on a UNE basis the electronics integrated into the xDSL service, the ILECs stand ready to monopolize data access in the same way (and, indeed, using much of the same equipment) as they now control the local voice telephone business.

Further, economic inefficiency would result from a lack of UNE access to the ILECs' DSL electronics. *First*, SBC local exchange customers that want to choose another competing data provider would be required to pay a premium: the installation and monthly costs of an

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<sup>14</sup> As discussed below, Section 10 of the Act precludes forbearance from SBC's Section 251(c) obligations. This Section 10 limitation confirms the Congressional intent for SBC and other ILECs to open their entire local network to competition, with no exceptions.

<sup>15</sup> Petition at 3, 7 ("ADSL . . . adds high-speed data capability to traditional local exchange service").

<sup>16</sup> Petition at 18-19 (SBC describes an internal three-step process by which it may deny loops to competitors).

additional line.<sup>17</sup> However, the consumer expense of that second line would be avoided if the DSL electronics were offered on a UNE basis to competing providers. *Second*, a lack of UNE access to the ILEC's DSL electronics could cause over-investment, with SBC and each competitor purchasing, installing, and maintaining its own separate DSLAM equipment. At the same time, the cost of a DSLAM to serve just a few customers from a given central office would tend to discourage competition for ADSL service in all but the most lucrative areas.<sup>18</sup> *Third*, collocation space in the central offices is wasted by forcing each competitor to install separate equipment; once the space is depleted, competitive voice and data entry in those markets is stifled.

UNE access to equipment used for ADSL service would also have pro-competitive effects of stimulating additional entry and innovation in the data service markets. As the Commission concluded in the Local Competition Order, "[t]he procompetitive effects of our conclusion [to require unbundling of propriety network elements] generally will stimulate innovation in the market, *offsetting any hypothetical reduction in innovation by the incumbent LECs*."<sup>19</sup>

Finally, it is doubtful that the requested "relief" is necessary to encourage the ILECs to deploy ADSL. While SBC alleges that unbundling causes "disincentives to innovate and

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<sup>17</sup> Petition at n. 17.

<sup>18</sup> "Implementation of Local Competition Provisions in the Telecommunications Act of 1996," First Report and Order, CC Dkt. No. 96-98, 11 FCC Rcd. 15497, ¶ 283 (1996) (subsequent history omitted) ("Requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act.").

<sup>19</sup> Id. at ¶ 282.

invest"<sup>20</sup> and forces the ILEC to "bear[] all of the risks and burdens . . . but few of the benefits,"<sup>21</sup> the ILECs' actions show that they experience no such disincentive in today's regulatory environment. In fact, the ILECs, including SBC, are aggressively rolling out DSL service:

- On May 27, 1998, SBC announced deployment of ADSL in more than 200 communities across California. ADSL-equipped central offices currently serve approximately 4.4 million households and 650,000 business customers.
- On December 9, 1997, Ameritech launched ADSL service, and plans to make this service available to 7 out of 10 Ameritech customers in the next 3 years.
- On May 20, 1998, BellSouth announced that it will begin offering ADSL services to the first of 30 Southeastern markets in late August, 1998.
- On January 29, 1998, U S West announced plans to offer ADSL services to more than 40 cities in its in-region 14 states in the first half of 1998.
- On June 3, 1998 Bell Atlantic announced that it will begin offering ADSL service to customers in Washington, Pittsburgh, and Philadelphia in September, 1998. ADSL will be available to customers in New Jersey's Hudson River area in October and in New York City and Boston next year.
- On April 13, 1998, GTE announced that it will deploy ADSL service in 300 central offices across 16 states.

3. *"Public Interest" Is Best Served by Implementing Section 251(c) Resale*

SBC posits that forbearance of resale obligations (either through UNEs or the wholesale resale obligations of Section 251(c)(4)(A)) would "incent[] other carriers to make investments in ADSL technology." Petition at 27. It claims that independent competitors will promote ADSL technology "if carriers cannot obtain ADSL capabilities from the SBC LECs." Id. CIX submits

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<sup>20</sup> Petition at 26.

<sup>21</sup> Id. at 27.

that these arguments are essentially a challenge to the Congressional decision to spur local competition through UNE and wholesale discount resale.<sup>22</sup> As such, Congress has decidedly voted for resale as a means of promoting all types of local telecommunications competition (including for data services). It is certainly in "the public interest" to implement that Congressional policy.

**B. SBC's Collocation "Commitment" Falls Short.**

SBC asserts that it "will continue to observe [its] obligations to provide physical and virtual collocation for the ADSL equipment used by other carriers." Petition at 20. However, according to Covad, it has proven very difficult to obtain collocation access to ILEC central offices for purposes.<sup>23</sup> Covad indicated that the ILECs claim no space availability in as many as 15-20% of the central offices that it seeks collocation, even for central offices of residential areas in which Covad would be the first collocater. This denial of collocation creates competitive barriers for CLECs, as ILECs are able to locate their DSL equipment with no difficulty. For example, even though Covad's collocation applications have been denied in some San Francisco Bay Area offices, Pacific Bell has since begun to provide DSL services from those same offices. This is a clear indication that the ILECs are taking advantage of their position in the deployment of DSL, as obviously there did exist space for DSL central office equipment.

In the context of ADSL service, a lack of adequate collocation by the ILEC can have devastating effects on competition. As SBC observes, its own ADSL service is limited to

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<sup>22</sup> S. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 148.

<sup>23</sup> See Comments of Covad, CC Dkt. No.s 98-11, 98-26, 98-32 at 8-14 (April 6, 1998). See also Comments of the DSL Telecommunications Alliance ("DATA"), CC Dkt. No.s 98-11, 98-26, 98-32, at 10 (April 6, 1998); Comments of E. Spire Communications, CC Dkt. No. 98-78, at 6 (June 18, 1998).

customers within a wired distance (from end-user to central office) of 16,000 feet.<sup>24</sup> Obviously, CLECs are equally limited by these technical constraints, and so inadequate collocation in SBC's ADSL-equipped central office would foreclose competition in that market. SBC should do much better on collocation, and commit to greater equivalency, prior to receiving any regulatory relief from the Commission.

**C. The Public Interest in a Competitive Internet Market is Not Served By SBC's "Commitment" to ISP Bundling of ADSL.**

The SBC Petition states that ISPs may obtain access to the ADSL service through SBC's fast-packet network. Petition at 21. However, under SBC's plan, an ISP's *only means* of access to customers is through purchase of SBC's ATM cell-packet network service.<sup>25</sup> CIX believes this ISP arrangement is inadequate, and is wholly inconsistent with the promotion of competition on the Internet, for several reasons.

*First*, SBC proposes to use its ATM Network service as an access "bottleneck" for ISPs. Apparently, SBC will not allow other providers of ATM service to connect to its DSLAMs, nor does SBC offer interconnection of other ATM providers for the purposes of data transport among ISPs. Thus, an ISP must either connect to SBC's ATM Network service, or be cut off from any access to SBC end-user ADSL customers. CIX submits that, from the ISP perspective, SBC could greatly the competitiveness of data services by allowing local data interconnection and transport by data competitive access providers ("D-CAPs"), as proposed by ITAA.<sup>26</sup> The D-

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<sup>24</sup> Petition at n.6.

<sup>25</sup> Petition, Attachment 1; See also Pacific Bell ADSL Tariff, Description and Justification at 6-7.

<sup>26</sup> Comments of ITAA, CC Dkt. Nos. 95-20, 98-10, at 30-31 (Mar. 28, 1998). See also, Comments of E. Spire Communications, CC Dkt. No. 98-78, at 4 (June 18, 1998) ("the ability to interconnect with competing service providers is as important to the development of data competition as it has been to competition in local voice services").

CAP could then offer the aggregated data transport services to local ISPs, in competition with SBC's ATM service. Without competitive alternatives like D-CAPs, SBC holds an absolute "bottleneck" to customers, allowing SBC to raise its rival ISPs' costs through the provisioning and pricing of ATM Network services, and thereby stifle effective competition by independent ISPs.

*Second*, SBC fails to explain whether its own affiliated-ISP would also obtain the ATM Network services, and all related transport charges, on the same terms as independent ISPs. Under the Commission's Computer III rules, the SBC affiliate may be collocated in the central office.<sup>27</sup> However, to avoid a competitive disparity, Computer III also requires SBC to minimize the ISP's cost of transport relative to the SBC-affiliate's costs.<sup>28</sup> SBC has failed to explain whether its affiliated-ISP will collocate, or whether the independent ISPs would obtain ATM Network services at a price and on terms that are at parity with the SBC-affiliated ISP.

*Third*, SBC fails to explain why ISPs are not permitted to gain access to customers by purchasing ADSL-conditioned loops from SBC, rather than purchasing the noncompetitive SBC ATM service. These loops should be made available to ISPs pursuant to SBC's ONA obligations. From its inception, the Commission required ILECs to unbundle "to the extent technologically feasible."<sup>29</sup> As the Ninth Circuit described it, ONA is intended to "enable enhanced service providers to pick and choose network service elements to design and develop enhanced services."<sup>30</sup> Since 1991, the Commission has recognized that a "more fundamental

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<sup>27</sup> Computer III Final Decision, 104 F.C.C. 2d 958, 1042 (1986) (subsequent history omitted).

<sup>28</sup> Id.

<sup>29</sup> Id. at 1065.

<sup>30</sup> California v. FCC, 39 F.3d 919, 929 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1427 (1995).

unbundling could be a socially desirable goal," and that "properly designed ONA networks should be characterized by efficient interconnections and unbundled offerings that will the limit the carrier's ability to engage in discrimination and be hospitable to the competitive offering of enhanced services."<sup>31</sup> Because SBC asserts that nondiscriminatory offerings of ADSL-conditioned loops to competitors is technical and commercially feasible (Petition at 17-18), those loops should be made available to ISPs, as well.

**D. Classifying SBC's ADSL Service as "Non-Dominant" would Disserve the Public Interest.**

SBC requests forbearance from dominant carrier tariffing obligations and pricing constraints so that it may offer ADSL "like the non-regulated providers and nondominant carriers that are the SBC LECs' competitors in this high-speed data market." Petition at 28. However, because SBC holds a unique near-monopoly and dominant position, it is certainly not the same as other providers. Thus, there is no "public interest" in forbearance of dominant carrier regulation where, as in this case, that regulation serves its intended purposes.

SBC's ownership of the means of access to the end-user -- the ubiquitous lines and central office facilities -- provides it with exclusive control over the essential telecommunications inputs necessary for ADSL service via the telephone network.<sup>32</sup> It is indisputable that SBC, and other

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<sup>31</sup> BOC ONA Order-- Phase I, 4 FCC Rcd. 1. 5, 62 (1988) (subsequent history omitted).

<sup>32</sup> Since SBC controls the essential input for ADSL, it is irrelevant that other providers may have initiated some service prior to SBC's launch. See, e.g., "Computer III Further Remand Proceedings," Further Notice of Proposed Rulemaking, CC Dkt. No.s 95-20, 98-10, FCC 98-8, at ¶ 9 (rel. Jan. 20, 1998) (Computer III regulation of BOCs necessary because of "incentive to use existing market power in local exchange services to obtain an anticompetitive advantage" in enhanced services markets); First Report and Order, CC Dkt. No. 96-262, 12 FCC Rcd. 15982, ¶ 275 (1997) ("Access Charge Reform Order") (ILECs may be able to engage in "price squeeze" against IXC competitors since the ILECs' "interstate exchange service is a necessary input for long-distance services").



ILECs, continue to hold a virtual monopoly over the local PSTN. See FCC Trends in Telephone Service, at Table 9.1 (February, 1998) (in 1996, 99.0% of all local service revenues (including interstate access) went to ILECs). Thus, even if SBC chooses to name its ADSL service as "interstate access" (which CIX strongly objects to, as discussed in Part I.E below), it cannot conceivably argue that it now provides interstate access in a fully competitive market. The Commission has already concluded, in the context of the BOCs' entry into interLATA services, that "the BOCs currently possess market power in the provision of local exchange and exchange access in their respective regions," and so dominant carrier regulation would be justified to prevent BOC's from controlling the long-distance market through restricting output in the local market.<sup>33</sup> The same anticompetitive potential is present in the ADSL market. Further, as the Commission noted on interstate access in the Access Charge Reform Order, "[d]eregulation before competition has established itself . . . can expose consumers to unfettered exercise of monopoly power and, in some cases, even stifle the development of competition, leaving a monopolistic environment that adversely affects the interests of consumers."<sup>34</sup> For these reasons, the Commission established access deregulation for ILECs "only when the reliability of market forces can be fully determined with respect to a particular service."<sup>35</sup>

Of course, SBC cannot demonstrate the existence of pervasive in-region competition that provides alternative access arrangements to the customer. Instead, SBC cites "ADSL

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<sup>33</sup> Regulatory Treatment of LEC Provision of Interexchange Services," Second Report and Order and Third Report and Order, CC Dkt. Nos. 96-149, 96-61, 12 FCC Rcd. 15756, 15813 (1997). The Commission chose not to apply dominant carrier regulation *only* because it found that the Section 271 and 272 protections adequately prevented monopolistic abuse. Id. at 15815-19.

<sup>34</sup> Access Charge Reform Order, at ¶ 270.

<sup>35</sup> Id. at ¶ 274.

competitors" and "Satellite-based Internet access"<sup>36</sup> but, these independent providers are themselves dependant on SBC's local telephony network. Deregulation of SBC prior to the arrival of vigorous local telecommunications competition would spell disaster for these competitors because they have no other feasible alternative means of access to customers. Moreover, while it requests blanket deregulation of its ADSL services in all of its in-region states, SBC also asserts that the service will be launched in markets where there is no ADSL competition at all.<sup>37</sup> Further, SBC fails to provide the number of these 200 communities that are served by an alleged ADSL competitor, or, of the 200 communities, how many are served by an independent telecommunications provider which could currently offer alternative access to end-users. Without actual competition in the local markets, it is entirely premature to consider SBC as a nondominant provider of the essential local telecommunications inputs of ADSL service.

**E. SBC's Treatment of Internet Communication From the End-User to the ISP as Interstate Access Contradicts Commission Policy.**

The SBC Petition (at 9, 22) characterizes its ADSL service as an interstate access service. Obviously, in the context of this request for relief, SBC is wrongly attempting to encourage the Commission to change its position on the jurisdictional nature of this traffic.

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<sup>36</sup> Petition at 15-17. As CIX understands it, satellite Internet access would entail use of the SBC local network as an "upstream" channel. Therefore, if no actual competition in the local telecommunications market exists, satellite providers are just as subject to SBC's anticompetitive actions in a deregulated environment as are terrestrial Internet providers.

<sup>37</sup> Petition at 34. SBC intends to "equip eighty-seven (87) central offices with ADSL" which currently serve "over 200 California communities and approximately 4.4 million households and 650,000 business customers." *Id.* at 21.

However, the Access Charge Reform Order, and the on-going NOI on Internet Usage,<sup>38</sup> establish a clear Commission public policy and principles for incumbent local exchange carriers, such as SBC, to offer network access to end-users and ISPs. The Commission specifically affirmed its policy conclusion that "ISPs should not be subjected to an interstate regulatory system . . . .,"<sup>39</sup> and found that "the existing pricing structure for ISPs should remain in place."<sup>40</sup> While many incumbent local exchange carriers argued in the Access Charge Reform proceeding that the Commission should force ISPs to accept ILEC data access alternatives and should be treated as interstate carriers, the Commission declined to adopt such an approach. As the Commission noted, "[incumbent LECs and ISPs] disagree on what pricing structure would provide incentives for deployment of the most efficient technologies. The public interest would best be served by policies that foster such technological evolution of the network."<sup>41</sup>

The Commission should decline SBC's invitation to contradict these policies. Further, as discussed below, SBC's characterization of ADSL as an interstate access service is likely to cause conflict with state regulators, and undermine the purposes of federal-state cooperation embodied in Section 706.

## **II. SBC Fails to Demonstrate that Forbearance Is Permitted Under the 1996 Act.**

SBC asserts that its request for "nondominant" regulation of its ADSL service meets the Section 10 standard for forbearance, and that Section 706 permits the Commission to forbear from Section 251(c) unbundling and wholesale resale obligations. As discussed above, CIX

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<sup>38</sup> Notice of Inquiry on the Implications of Information Service and Internet Usage, CC Dkt. 96-263, FCC 96-488 (rel. Dec. 24, 1996) ("NOI on Internet Usage").

<sup>39</sup> Access Charge Reform Order, 12 FCC Rcd. at 16133.

<sup>40</sup> Id.

<sup>41</sup> Id. at 16134.

finds that the SBC Petition does not meet the "public interest" standard of Section 10 or Section 706 and, for that reason, the Petition should be dismissed.

Even apart from the "public interest" standard, the SBC Petition affronts other aspects of the 1996 Act. It fails to meet the other two prongs of the Section 10 forbearance test, and so relief from dominant carrier regulation cannot be granted. Further, the SBC's Petition fails because (a) Section 706 is not an independent grant of forbearance authority, (b) it would offend the purposes of Section 706 for advanced services to be provided in a *competitive market*, and (c) it asks for the Commission to violate the Section 706 mandate for the Commission and the states to work together, especially on intrastate telecommunications issues such as ADSL.

**A. SBC Does Not Meet the Section 10 Forbearance Test.**

The SBC Petition (at 30-32) fails to meet the Section 10 forbearance standards. Under section 10(b) of the Act, the Commission must consider "whether forbearance will promote competitive market conditions -- including the extent it will enhance competition among providers of telecommunications services."<sup>42</sup>

The Commission can only grant forbearance on the finding that :

"(1) enforcement of such regulation is not needed to ensure just, reasonable and nondiscriminatory practices with respect to telecommunications carriers or the service in question;

(2) enforcement of such regulation is not required for consumer protection; and

(3) forbearance from applying such regulation is consistent with the public interest."

The SBC Petition fails to meet the Section 10(b)(1) prong of the test. Nondominant carrier regulation at this time -- when SBC is, in fact, a dominant provider of the essential inputs of any telephony-based ADSL service -- would permit an array of unjust unreasonable and

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<sup>42</sup> 47 U.S.C. § 160.

anticompetitive practices by SBC. If SBC were deregulated, it will have every incentive and the market power control over the access lines to end-users to further its monopoly.

For these same reasons, the Section 10(b)(2) prong of the test is also unmet. Deregulation while SBC holds monopoly access to the customer would effectively stifle competition. Needless to say, this result would also directly harm consumers, who will suffer from a lack of diversity of service offerings, noncompetitive pricing, and the elimination of competitive incentives to innovate even better high-bandwidth services. Such forbearance from dominant carrier regulation at this time would direct contravene Section 706, harming both nascent competition and, ultimately, American consumers.

**B. Section 706 Does Not Permit the Forbearance Requested By SBC.**

**1. Section 706 is Not an Independent Basis of Forbearance Authority from Section 251(c) Obligations.**

Contrary to SBC's assertions, Section 706 does not permit the Commission to engage in forbearance independent from the Section 10 forbearance process. Moreover, SBC's request for forbearance from Section 251(c) obligations prior to the time that it has met the competitive checklist requirements of Section 271 is expressly forbidden by Section 10(d) of the Act. Nothing in section 706 indicates that the Congress intended for Section 706 to override the Section 10 process or limitations.

As the Commission well knows, the Section 10 and Section 706 forbearance issues have been briefed many times by CIX and others in related proceedings, and CIX incorporates by reference herein the arguments it has already presented.<sup>43</sup>

**2. SBC's Relief Proposals Would Contravene Section 706.**

Even assuming, arguendo, that Section 706 could be construed as an independent source of forbearance authority, SBC's request for forbearance does not comply with the 706

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<sup>43</sup> See Comments of CIX, CC Dkt. No. 98-32, at 20-32 (April 6, 1998).

requirements. Section 706 states that the Commission shall encourage the deployment of advanced telecommunications capabilities by utilizing in a "manner consistent with the public interest . . . measures that promote competition in the local telecommunications market, or regulating methods that remove barriers to infrastructure investment." 1996 Act, § 706(b). To allow SBC to forbear from its unbundling and wholesale resale obligations under Section 251(c) would be detrimental to the realization of competitive local services and competitive rates to consumers. The competitive safeguards of the 1996 Act work together with the Section 706 advanced services objectives, and not against them.

Fostering CLEC competition in the local market serves the Section 706 goals for advanced telecommunications capabilities. With unbundled elements and Section 251(c) resale, CLECs can effectively compete with ILECs' introduction of advanced, broadband local access services. Requiring that ILECs comply with these statutory requirements is good policy and should be continued, and to veer from that Congressional policy would conflict with the obligations of Section 706.

Finally, CIX notes that, despite SBC's best efforts at re-categorizing the service, ADSL is a local telecommunications service from the customer to its local ISP. As a local telecommunications service, any relief provided under Section 706 would require joint and harmonious implementation by the Commission and the affected States. 1996 Act, § 706(a) ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment of . . . advanced telecommunications capability . . ."). This same statutory language also recognizes that, absent appropriate federal preemption, the States have jurisdiction over advanced telecommunications that are intrastate. SBC has failed to address these Section 706 jurisdictional issues.

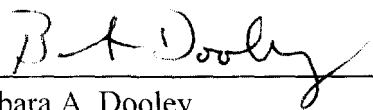
### **Conclusion**

For the foregoing reasons, CIX believes that the Commission should dismiss the SBC Petition. The competitive provision of advanced telecommunications services, such as ADSL, cannot be achieved in the manner outlined by SBC. Instead, the grant of the SBC Petition would frustrate the ability of other telecommunications providers to bring competition to SBC's vast in-region markets, and would significantly harm the ability of independent ISPs to continue to enrich the Internet services enjoyed by American consumers.

Respectfully submitted,

COMMERCIAL INTERNET EXCHANGE  
ASSOCIATION

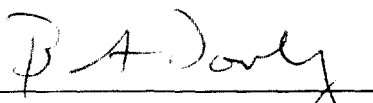
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### **SUBSCRIPTION AND VERIFICATION**

I, Barbara A. Dooley, declare under penalty of perjury that the foregoing "COMMENTS OF THE COMMERCIAL INTERNET EXCHANGE ASSOCIATION" is true and correct, that to the best of my knowledge, information and belief there is good ground to support it, and that it is not interposed for delay.

  
Barbara A. Dooley

June 24, 1998

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was this 24th day of June, 1998 hand delivered or mailed, postage prepaid to the following:

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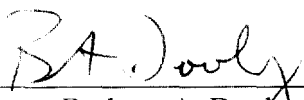
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